Although the legislature's purpose may be examined to determine the character of a cause of action expressly created, yet a wholly dissimilar common-law cause of action can scarcely be destroyed by any construction of the statute.[11] To protect fully the interests of society, a statute providing against this difficulty should be passed.

THE RULE AGAINST PERPETUITIES AND POWERS. — The writer of a note in the Law Quarterly Review for January[1] on the case of *In re de Sommery*[2] seems to have imagined that Parker, J., made a serious mistake in stating that a special power so limited that it may be exercised at a time beyond lives in being and twenty-one years afterwards is absolutely void. The rule is stated in substantially these words by Mr. Gray[3] and Mr. Marsden.[4] The language of the learned judge was "A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards, is, by reason of the rule against perpetuities, absolutely void; but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule." The writer of the note sets out the first part of this sentence, down to the semicolon, and then quotes from the judgment of Lord Cairns in Slark *v.* Dakyns,[5] where, in speaking of a power given to a daughter, he says, "It does not follow that because the original power might have been badly exercised, yet, if it is so exercised as not to infringe the rule, the possibility of its being exercised in another way would make the power void," which is exactly what Parker, J., says in the last part of the same sentence. The note also refers to Lord St. Leonards, and says that "he too thought that a power was not invalid if it could be exercised, although not necessarily so, within the limits of the rule against perpetuities." But Lord St. Leonards does not use language of this kind at the pages referred to,[6] and he only says that a power may be given to a person *in esse* to appoint to grandchildren or remoter issue, and, if he only appoint to such as are living at his death, it will be good. Lord St. Leonards, like Lord Cairns, is speaking of a power given to a living person, which, as Parker, J., says, "must, of course, if exercised at all, be executed during his life, and is therefore valid." The statements of both of them go only to the point that the power is not bad merely because its terms would permit an appointment to objects that are too remote, which is now a familiar rule.[7]

[11] If, instead of looking at the statute for express authority, a court proceeded on the theory that it was in substance carrying out at common law a policy declared by the legislature, the question would be more open to doubt. But even then, it is submitted, the abolishing of a common-law cause of action in a particular circumstance is a type of judicial legislation not warranted by authority. See 26 HARV. L. REV. 531.

[1] 29 LAW QUARTERLY REVIEW, 13.
[2] [1912] 2 Ch. 622.
[3] GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 473, 475.
[4] MARSDEN, PERPETUITIES, 239.
[5] L. R. 10 Ch. 39.
[6] SUGDEN, POWERS, 8 ed., 152, 397.
[7] GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 473, 510; MARSDEN, PERPETUITIES, 236.

It might almost be supposed from what is said in the note in speaking of a power which can be "exercised, although not necessarily so, within the limits of the rule against perpetuities," or which "can only be exercised outside the limits," that the writer is referring to the manner in which a power may be exercised, and not to the time within which by its terms it may be exercised. But if he referred to the manner of its exercise, he would only be saying what is more clearly said by Parker, J., that, if the power can only be exercised within the legal period, it is good, although a particular exercise of it might be void. The writer of the note does not expressly deny the existence of the rule that a power is void unless it is in some way limited so that it must be exercised, if at all, within the period allowed for future limitations to take effect. He says that, "if the power can only be exercised outside the limits, it is invalid," and refers to Floyer *v.* Bankes [8] and Goodier *v.* Edmunds;[9] but these cases decided that a power that might by its terms be exercised at a time beyond the limits was void. The latter case was decided in accordance with a *dictum* of Jessel, M. R., regarding the same will in Goodier *v.* Johnson,[10] namely, "It seems to me, however, that the trust for sale is bad, as it is not limited to take effect within the period of a life in being and twenty-one years after." He might also have cited the cases of Wollaston *v.* King [11] and Morgan *v.* Gronow,[12] in which testamentary powers of appointment were given to persons not *in esse* at the date of the settlement under which the powers were created, and they were held to be void because they might be exercised at a time beyond the legal limit. In neither of these cases was there any question as to the time when the power was actually exercised, or the manner in which it was exercised, and in the latter case the power would have been valid if it had in terms been limited to the time when it was in fact exercised, for the will of the daughter, to whom it was given, took effect in the lifetime of her father who was living at the date of the settlement. The statement in the note that "the pronouncement of Parker, J., also seems inconsistent with the decisions" in Briggs *v.* Oxford [13] and *In re* Stamford [14] is surprising, for it overlooks the circumstance that in those cases the powers were subsequent to estates tail, and were held to be valid on the ground that the tenant in tail, by barring the entail, would bar also the power, according to the well-known rule.[15]

The facts in the case of *In re de Sommery* were very simple. The testator directed the trustees for the time being of his will to hold part of his estate "upon trust to pay the capital or income thereof, or neither, to my nephew the said Eugene de Sommery, or to apply the capital or income thereof, or any part of either for his benefit, or for the benefit of his wife or any child or children of his," according to their discretion, and there was no other limit to the duration of the trust. Parker, J., held that the powers of the trustees were not limited to the lives of the living trustees, as they were vested in the trustees for the time being, and, as regards the nephew's children, might be exercised during the life of

[8] L. R. 8 Eq. 115.
[9] [1893] 3 Ch. 455.
[10] 18 Ch. D. 446, 447.
[11] L. R. 8 Eq. 165, 169, 170.
[12] L. R. 16 Eq. 1, 10.
[13] 1 DeG., M. & G. 363.
[14] [1912] 1 Ch. 343.
[15] GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 490; MARSDEN, PERPETUITIES, 243.

any afterborn child and would therefore be void, if there were only a single power. But he came to the conclusion that there were two powers, one to pay to the nephew, which was necessarily confined to his life and consequently valid, the other to apply for the benefit of him or his wife or children, which might be exercised at a time too remote and was therefore void. J. L. T.

RECENT CASES.

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — PARTIES TO WRITINGS: PAROL EVIDENCE TO EXONERATE AGENT. — The plaintiff and the defendant entered into a written contract with the oral understanding that the contract was between the plaintiff and the defendant's principal. *Held*, that parol evidence is not admissible to exonerate the defendant. *Gordon Malting Co.* v. *Bartels Brewing Co.*, 206 N. Y. 528, 100 N. E. 457.

When the parties to a contract have embodied the terms in a written agreement, parol evidence is in general inadmissible to show that the actual agreement was otherwise. *Van Syckel* v. *Dalrymple*, 32 N. J. Eq. 233. See 4 WIGMORE, EVIDENCE, § 2425. Under the facts of the principal case, therefore, the agent cannot show that he was to be free from personal liability. *Nash* v. *Towne*, 5 Wall. (U. S.) 689; *Cream City Glass Co.* v. *Friedlander*, 84 Wis. 53. See *Higgins* v. *Senior*, 8 M. & W. 834, 844. If there is any ambiguity on the face of the instrument as to the rôle in which the agent acts, it is explainable. *Kean* v. *Davis*, 21 N. J. L. 683; *Armstrong* v. *Andrews*, 109 Mich. 537, 67 N. W. 567. And if agents in signing their own names carried the fiction of agency so far as actually to denote their principals thereby, the evidence might be admissible to construe the meaning of the signature. *Cf. Myers* v. *Sarl*, 3 El. & El. 306. But it would not seem that agents do so use their names. Force is lent to the suggestion, however, by the admission of evidence to charge the principal under the same facts. *Calder* v. *Dobell*, L. R. 6 C. P. 486; *Lerned* v. *Johns*, 91 Mass. 419. *Contra*, *Chandler* v. *Coe*, 54 N. H. 561. But evidence of collateral agreements is admissible if the written document is one which might naturally not include that agreement and was not so intended. If the parties intended a double liability, they might be likely not to seek to bind both principal and agent on the same document. Evidence that the principal was also to be bound on the contract can be properly admissible only on this ground.

AGENCY — PRINCIPAL'S LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR — LIABILITY FOR NEGLIGENT BLASTING. — An independent contractor was engaged in blasting on the defendant's land. Due to his negligence rocks were hurled upon the plaintiff's land. *Held*, that the plaintiff may recover from the landowner. *Hounsome* v. *Vancouver Power Co.*, 23 West. L. Rep. 167. (Brit. Col., Ct. App.)

Under the English rule of absolute liability for injury caused by the escape of anything brought onto his land, an owner is liable even though the escape was caused by the act of an independent contractor. *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. Such a broad rule would cover this case. But in many jurisdictions in this country this absolute liability is not recognized. *Marshall* v. *Wellwood*, 38 N. J. L. 339; *McCafferty* v. *Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178. When, indeed, the act of the contractor is such that the injury flows directly and necessarily from this act, the owner is liable in trespass, without regard to negligence. *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *Hoffman* v. *Walsh*, 117 Mo. App. 278, 93 S. W. 853. But otherwise, by the weight of authority, and